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No. [redacted] 122

In the Supreme Court of the United States

OCTOBER TERM, 1928

FEDERAL RADIO COMMISSION, PETITIONER

v.

GENERAL ELECTRIC COMPANY, AND PEOPLE OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

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PETITION

A

STATEMENT

This petition is directed at a judgment entered by the Court of Appeals on February 25, 1929 (rehearing and stay of mandate denied March 9, 1929), as follows:

> It is the judgment of this court therefore that the appellant, the General Electric Company, was on November 11, 1928, and is now, entitled to receive from the Federal Radio

> Commission a renewal of its license to operate station WGY upon the same terms as those contained in the license dated November 1, 1927, to wit, upon 790 kilocycles with power of 50 KW., and without time limit for operation; and this cause is remanded to the Federal Radio Commission to carry this judgment into effect. Costs assessed against appellee. (R. 392.)

The judgment was entered in three causes (Nos. 4870, 4871, and 4880), which were heard upon one record and treated as one case. In two of the causes General Electric Company was appellant; in one of them People of the State of New York was appellant. Unless otherwise indicated, the word "respondent" will be used to refer to respondent General Electric Company.

All three causes were appeals under Section 16 of the Radio Act of 1927 from a single decision of the Federal Radio Commission made and entered on October 12, 1928. (R. 133, 138.) The Commission's decision was with reference to an application of respondent for renewal of its license to operate its broadcasting station WGY at Schenectady, New York. (R. 90–95.) The license sought to be renewed was issued November 1, 1927, and originally covered a period of two months (R. 88–89); it was successively extended for short periods (never more than sixty days) so that it finally expired on November 11, 1928 (R. 89).

Respondent's license of November 1, 1927, authorized the use of 50 KW. power on 790 kcs. with full

time operation. The Commission's decision of October 12, 1928, was that said application for renewal be granted, the renewal license to be for the same frequency, and substantially the same power, but with hours of operation reduced to what is defined by the regulations of the Commission as a "limited time" station. (R. 133, 138, 111, 109.) The new license was actually issued on October 17, 1928 (R. 188); it covered the period from November 11, 1928, to January 31, 1929. It was rejected by respondent which operated thereafter under a "stay order" from the Court of Appeals.

(1) Matters involved in certain motions of petitioner going to jurisdiction of Court of Appeals, etc.

Respondent General Electric Company filed its notice of appeal (No. 4870) in the Court of Appeals on November 9, 1928, twenty-eight days after the Commission's decision. (R. 1, 10.) On the same day the Court of Appeals granted said respondent's motion to "stay" the Commission's decision (R. 380); this stay order remained in effect thereafter. Respondent People of the State of New York filed its notice of appeal (No. 4871) from the same decision on the same day. (R. 10, 13.) Respondent General Electric Company filed another notice of appeal (No. 4880) from the same decision on November 30, 1928. (R. 13, 23.) Timely motions to dismiss were made by the Commission in all three causes (R. 364, 373, 376), the grounds, among others, being that none of the appeals were taken within twenty days after the effec-

tive date of the Commission's decision, as required by Section 16 of the Act; that the State of New York had no standing on appeal under Section 16; that the Commission's decision was not an appealable decision under Section 16; and that the notices of appeal filed were on their faces defective so as to fail to confer any jurisdiction on the court, and in one case (No. 4870) that the notice was such as to completely negative such jurisdiction (R. 1). The Court of Appeals took these motions under advisement, together with the case on the merits, and, by direct implication, overruled them in its final judgment.

Respondent General Electric Company attached to each of its notices of appeal long affidavits executed on personal knowledge by its own attorneys of record, Stephen Philbin, Esq. and Frank J. Hogan, Esq., covering many highly technical matters and incorporating large numbers of letters, affidavits, and other documents as exhibits which, although condensed, occupy over one hundred pages of the printed record. (R. 1–10, 13–23, 205–282.) For the most part the matters covered by these affidavits and exhibits were not presented to the Commission on or at any time prior to October 12, 1928, the date of its decision, or in support of the application for renewal. The Commission made timely motions in both causes to strike this matter on the ground that it was improperly injected into the record in contravention of the provisions of Section 16 of the

Act. (R. 368, 374.) The Court of Appeals took these motions under advisement with the case on the merits but ignored them in its final judgment; by necessary implication, however, it overruled the motions, since its opinion sets forth as facts certain matters which are to be found only in the documents sought to be stricken.

The Commission likewise made a timely motion to set aside the "stay order" of November 9th. (R. 370.) The Court of Appeals took this motion under advisement, together with the merits of the case, but the judgment, by necessary implication, overrules the motion.

The three causes were argued orally as one on December 3–4, 1928. On February 21, 1929, the Commission renewed its motion to dismiss, and, in addition to the grounds previously urged, set forth the further ground that the questions involved on the merits of the case were now all moot questions and that the court had no jurisdiction to enter any judgment with respect to the questions involved. (R. 381, 384.) These contentions were ignored by the Court of Appeals.

(2) Matters involved on the merits of the case

The opinion of the Court of Appeals, except in so far as it passes on the constitutionality of the Radio Act of 1927, and except for its judgment of costs against the Commission in favor of respondents on all three appeals, and except for the issuance of and refusal to set aside the "stay order,"

appears to be that of an administrative tribunal sitting on appeal over another administrative tribunal. The Court's decision, however, while avoiding the appearance of so doing, has held invalid in whole or in part the most important regulations yet adopted by the Commission.

Among the regulations held invalid in whole or in part are those incorporated in and popularly known as General Order No. 40 (R. 100–104), supplemented by General Order No. 42 (R. 110). General Order No. 40 was adopted August 30, 1928, effective October 1, 1928, and represents the Commission's effort to carry out the mandate of Congress to clear up the previously existing chaotic interference in the broadcast band (Section 4 (F), Radio Act of 1927) and to equalize broadcasting facilities among the five Zones and the States within the Zones (Section 5, Amendatory Act of 1928). The order classified the 96 channels in the broadcast band and placed restrictions on each of them with respect to the number of stations which might operate on them simultaneously and the power such stations might use. The order sets aside 40 of the channels, popularly known as "cleared channels," to be used by stations of substantial power (i. e., 5 KW. to 50 KW.) with the restriction that only one station might use such a channel at any time during night hours (R. 101, 104). The 40 channels were allocated eight to each of the five Zones. The channel of 790 kc. was designated as a cleared channel and assigned to the

Fifth Zone (R. 102) for exclusive interference-free evening operation.

It is generally conceded that stations of substantial power operating on cleared channels constitute the only means of furnishing rural and distant communities with broadcasting service. The engineering necessity for cleared channels is demonstrated by testimony of leading radio engineers heard by the Commission on July 23, 1928. (R. 343–363.) Other considerations entering into the formulation of General Order No. 40 will also be found in the Record. (R. 282–343.) The only complaint made by respondent against General Order No. 40 was that it should have provided for 50 cleared channels instead of 40. (R. 7, 21.) The Court of Appeals reduced the number to 39 by destroying 790 kc. as a cleared channel.

Having adopted General Order No. 40, the Commission, on September 8, 1928, made a tentative allocation of all broadcasting stations to "positions" in accordance with the order, and issued a list of new assignments which, together with a statement, was sent to every licensee, including respondent. (R. 106, 109, 112–114.) The allocation was to govern licenses issued for the next license period, beginning November 11th. It showed station WGY as assigned to 790 kc. with limited time operation and 50 KW. power; and station KGO at Oakland, California, also owned by respondent, was assigned to full-time operation with 10 KW. power on the same channel. (R. 138.) The meaning of

"limited time" was later crystallized in another general order. (R. 111.) As applied to Station WGY it meant that it would have to close down at the hour of sunset at Oakland, California, unless the Oakland station, KGO, would submit to a slight curtailment of time. The interference range of radio waves of two stations on the same channel is much less during daylight hours than after the hour when both are "linked by darkness," namely, sunset at the western station. If KGO would not submit to any curtailment, the Commission's ruling meant an average closing down for WGY at 9:06 P. M. at Schenectady, New York, varying from 10:32 P. M. in June to 7:56 P. M. in December. (R. 130.) The Commission, however, proposed and bound itself to approve an arrangement whereby WGY might operate every evening until 10 P. M. on condition only that KGO close down between sunset and 7 P. M. during those months when sunset at Oakland occurs prior to 7 P. M. (R. 117–119, 123.) This meant an average period of 51 minutes during which KGO would have to close down prior to 7 P. M. The two stations being both owned by respondent, General Electric Company, the matter rested entirely in its hands. The Court of Appeals completely ignored the arrangement proposed by the Commission, although the record is clear on the subject.

The Commission's statement of September 11th set forth in detail the procedure to be followed by

any station dissatisfied with its assignment; it called for an application on a prescribed form and provided for notice to interested parties, and hearing. (R. 114.) Respondent obtained the forms from the Commission (R. 115) and on October 5, 1928, filed such an application. (R. 125–129.) It chose, however, to defy the Commission by requesting full-time operation on 790 kc., which under General Order 40 was a cleared channel assigned to the Fifth Zone (R. 126), although there were eight other channels designated as cleared channels and assigned to the First Zone, all available to the respondent as the basis for application and hearing (R. 101). The application also asked for power of 150 KW, which was 100 KW in excess of the maximum permitted by General Order 42. (R. 110.) On October 12th the Commission denied the application without hearing on the ground that the application was in conflict with its regulations. (R. 161.) Respondent was notified of this action informally within a day or two and by formal notice on October 17th. (R. 161.) By repeated letters and verbal conferences thereafter the Commission explained to respondent that respondent could have a hearing at any time by complying with the Commission's regulations and requesting its full time on a cleared channel available to stations in the First Zone. (R. 162–171.) Respondent refused to do so.

On October 12th, the same day that the Commission denied the application just described, it took

action on all the applications for renewal of license then before it, including respondent's application for renewal as above explained. (R. 133.) The Court of Appeals confused this action with the Commission's action approving the allocation scheme as a whole. (R. 131.) The reason for this procedure was fully explained to all licensees and prospective applicants in the Commission's statement of September 11th (R. 113); as is there shown, applications for changes from dissatisfied stations were encouraged and hearings were to be accorded them.

The Court of Appeals, ignoring General Orders 40 and 42, awarded WGY full time operation on 790 kc. with power of 50 KW. It did this without any evidence before it other than that contained in the documents attached to respondent's notice of appeal and in the application of respondent for renewal of license. There having been no hearing before the Commission, the Commission could not and did not send up any evidence as to whether the granting of respondent's renewal application for full time would serve public interest, convenience, or necessity. The only evidence in the record on the seriousness of interference arising from simultaneous evening operations of WGY and KGO is to the effect that such interference would be very serious and would reduce the service range of both stations to a very small area around the transmitter of each.

(See for example R. 354–355.) The Court of Appeals therefore made its decision entirely on an *ex parte* record and was not consistent even with that.

The decision of the Court of Appeals has also by necessary implication held invalid the Commission's regulations governing procedure, which have been in force since its establishment. These regulations require that any application for a change "must specify what frequency, power, and/or hours of operation are desired by the applicant." (R. 114, 181–2.) When such an application is made, if it is otherwise in accordance with the Commission's regulations, all other interested stations are notified so that no change will be made without an opportunity for hearing on the part of all stations likely to be affected. This procedure is the only method which the Commission or, so far as it knows, anyone else has been able to devise to reduce the issues in the peculiar controversies that arise between competing broadcasting stations (or any other kind of radio stations) for the limited number of facilities available to the radio spectrum. The Court of Appeals has singled out respondent from nearly 650 broadcasting stations and has relieved it of any necessity for comparing its claims with the claims of any other station for preferred position.

B

REASONS FOR GRANTING THE WRIT

(1) The Court of Appeals has erroneously construed Section 16 of the Radio Act of 1927 in the following respects:

(a) In holding that the three appeals involved in this cause, or any of them, were filed "within twenty days after the decision complained of is effective."

(b) In holding that the respondent, State of New York, not being an applicant whose application is refused or a licensee whose license is revoked, has a right to appeal from a decision of the Commission.

(c) In holding that papers and evidence not presented to the Commission upon or in support of the application in question may be introduced into the record by merely attaching them to the notice of appeal or by any manner other than that prescribed for the taking of additional evidence in the second paragraph of Section 16.

(d) In holding that the Commission's decision of October 12th with reference to the renewal application of respondent, General Electric Company, was an appealable decision.

(2) The Court of Appeals has erroneously construed Sections 9, 10, 11, and 16 of the Radio Act of 1927, and Section 3 of the Amendatory Act of March 28, 1928, in entering a judgment on February 25, 1929, as to what respondent, General Elec-

tric Company, was *then* entitled to, over three months having elapsed after November 11, 1928, and the Commission being required every three months to determine, as it would on original application, whether the granting of a renewal application will serve public interest, convenience, or necessity.

(3) The Court of Appeals has erroneously construed Section 16 of the Radio Act of 1927 in holding that it has power to assess costs—

(a) against the Commission in any case;

(b) against the Commission in favor of a person not coming within the description of persons who may appeal under Section 16;

(c) in favor of a person on each of two appeals from the same decision.

(4) The Court of Appeals erroneously construed Section 16 of the Radio Act of 1927 in holding that said section invests said court with the powers and duties of an administrative tribunal, as distinguished from those of a judicial tribunal, in reviewing decisions of the Commission. If, however, the Commission is in error on this, then the Court of Appeals has no right to assess costs against the Commission, to enter such orders as its "stay order" of November 9, 1928, or to hold invalid any regulations of the Commission.

(5) The Court of Appeals erroneously construed Section 16 of the Radio Act of 1927 as giving it the right to determine in the first instance whether the granting of an application would serve public in-

terest, convenience, or necessity in a case where no hearing was held by the Commission on such application because of regulations of the Commission, which, if valid, made such a hearing a useless ceremony; the Court of Appeals has no right in such a case further than to remand the case to the Commission for hearing and then only if it finds the regulation invalid.

(6) The Court of Appeals has wrongly decided a question of immense general importance in holding invalid the regulations of the Commission incorporated in General Order 40, upon which the assignments of all the broadcasting stations of the United States, nearly 650 in number, are based and future controversies among them determined.

(7) The Court of Appeals has wrongly decided a question of general importance in holding invalid the Commission's regulations governing procedure covering applications and hearings on the part of and among broadcasting stations.

(8) The judgment of the Court of Appeals is arbitrary and capricious; it is based on conclusions of fact which are not only not supported by any evidence properly before the court but which are in substantial measure wholly refuted by undisputed evidence in the record; if the Court of Appeals is to be viewed as acting in an administrative capacity in appeals from decisions of the Commission, then a writ of certiorari issued by this court is the only means of obtaining relief from such judgments.

(9) The statutory provisions of the Radio Act of 1927 and of the Amendatory Act of March 28, 1928, hereinabove referred to, have never been construed or passed upon by this court; their proper construction has, because of the tremendously increasing importance and widespread use of radio communication, become a matter of extremely great general importance.

(10) The Court of Appeals in violation of Section 16 of the Radio Act of 1927 did not confine its revision of the Commission's decision to the points set forth in the several reasons of appeal.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the District of Columbia, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket, No. 4870, *General Electric Company, Appellant,* v. *Federal Radio Commission, Appellee;* No. 4871, *People of the State of New York, Appellant,* v. *Federal Radio Commission, Appellee;* and No. 4880, *General Electric Company, Appellant,* v. *Federal Radio Commission, Appellee,* and that the said judgment of the Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such

other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

FEDERAL RADIO COMMISSION,

BETHUEL M. WEBSTER, Jr.,
General Counsel of Federal Radio Commission.

PAUL M. SEGAL,
Assistant General Counsel of Federal Radio Commission.

LOUIS G. CALDWELL,
Special Counsel.

BRIEF IN SUPPORT OF THE PETITION

I

OPINION BELOW

The opinion of the Court of Appeals of the District of Columbia is reported in 31 F. (2d) 630. (R. 386.)

II

JURISDICTION

1. The judgment of the Court of Appeals of the District of Columbia sought to be reviewed was entered March 9, 1929. (R. 394.)

2. Jurisdiction to issue the writ is found in the provisions of Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 936.

3. The judgment of the Court of Appeals, entered February 25, 1929, found that the General Electric Company was on November 11, 1928, "and is now," entitled to receive from the Commission a certain kind of license; it remanded the cause to the Commission to carry the judgment into effect and assessed costs against the Commission in favor of the respective appellants. (R. 393.) This judgment by necessary implication held invalid in whole or in part certain important regulations of the Commission incorporated in General Order No. 40 (R.

100–104), since the license which the court ordered to be issued was inconsistent with these regulations. The judgment also by necessary implication held certain regulations with respect to procedure (R. 114, 181–2) invalid, as hereinafter explained. The court by necessary implication overruled the several motions of the Commission going to the jurisdiction of the court and to various matters of appellate procedure under Section 16 of the Radio Act of 1927. (R. 364–378.) For the other necessary implications of said judgment, see "Specification of Errors" below.

4. Cases believed to sustain the jurisdiction:

(*a*) Section 16 of the Radio Act of 1927 limits the Court of Appeals to the exercise of judicial as distinguished from administrative functions—

Federal Trade Commission v. *Klesner,* 274 U. S. 145.

I. C. C. v. *Illinois Central Railroad,* 215 U. S. 452.

Ma-King Products Company v. *Blair,* 271 U. S. 479.

United States v. *Duell,* 271 U. S. 576.

Eastman Kodak Co. v. *Federal Trade Commission,* 274 U. S. 620.

Stafford v. *Wallace,* 258 U. S. 495.

Degge v. *Hitchcock,* 229 U. S. 164.

Smith et al. v. *Foster et al.,* 15 F. (2d) 115 (D. C., S. D., N. Y., 1926).

Chamber of Commerce of Minneapolis v. *Federal Trade Commission,* 280 Fed. 45 (C. C. A., 8th, 1922).

(*b*) The following functions, exercised by the Court of Appeals in this case, are judicial and not administrative in character:

Assessment of Costs—

Tesla Electric Co. v. *Scott et al.*, 101 Fed. 524.

Holding regulations of Commission invalid—

U. S. ex rel. Steinmetz v. *Allen*, 192 U. S. 543.

U. S. v. *Antikamnia Co.*, 231 U. S. 652.

Smoot v. *Heyl*, 227 U. S. 518.

Issuance of prerogative writ in aid of appellate jurisdiction—

Western Union Telegraph Co. v. *Myatt et al.*, 98 Fed. 335.

III

STATEMENT

A full statment of the case has been given under heading A in the petition and in the interest of brevity will not be repeated.

IV

SPECIFICATION OF ERRORS

A full statement of the errors intended to be urged has been given under heading B in the petition and in the interest of brevity will not be repeated.

V

ARGUMENT

(Note: The statutes involved are the Radio Act of 1927, 44 Stat. 1162, Amendatory Act of March 28, 1928, and Amendatory Act of March 4, 1929. These statutes being long, they are set out in Appendices A, B, and C, respectively.)

SUMMARY OF THE ARGUMENT

Point A. In overruling petitioner's several motions, the Court of Appeals has erroneously construed Section 16 of the Radio Act of 1927.

Point B. The Radio Act of 1927 does not invest the Court of Appeals with the powers and duties of an administrative tribunal.

Point C. The Commission's regulations incorporated in General Order No. 40 and its regulations governing its procedure are valid.

Point D. The judgment of the Court of Appeals was arbitrary and capricious.

Point E. The Court of Appeals erred in assessing costs against the Commission.

Point A

In overruling petitioner's several motions, the Court of Appeals has erroneously construed Section 16 of the Radio Act of 1927

Secton 16 requires that an appeal be taken—

> by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

None of the three appeals involved in this case were taken within twenty days of the date on which the Commission's decision was made and entered, namely, October 12, 1928. (R. 130–133.) We contend that, with respect to the limitation of time for appeal, a decision of the Federal Radio Commission should be viewed in the same light as the decision of any other administrative or quasi-judicial tribunal or the judgment of a court. The usual, and, so far as we know, the universal rule is that the limitation begins to run when the decision or judgment is entered. This is for the reason that it is then a final decision or judgment, in other words, *effective*.

The reason for the use of the word "effective" in Section 16 is found in the provision of Section 14 having to do with orders of revocation of license:

> That no such order of revocation shall take effect until thirty days' notice in writing thereof * * * has been given to the parties.

There is no such provision in the statutes with regard to any of the four kinds of applications denials of which are subject to appeal. A denial of an application for renewal of license is the same in juristic nature as a denial of an application for a license or a denial of an application for a construction permit. The Commission might itself specify an effective date later than the actual date of the decision but otherwise the decision is final and conclusive for all practical purposes when it is made.

The third to the last paragraph of Section 5 of the Radio Act of 1927 (covering appeals from decisions of the Secretary of Commerce to the Commission after December 31, 1929) supports our construction of Section 16. There the time limitation is from the date of the decision. The Secretary of Commerce after December 31, 1929, will have original power to make decisions on applications but will not have such power on revocation of license. (See first paragraph of Section 5.)

The Court of Appeals, however, ignored the date of the decision and by implication seems to find the effective date as November 11, 1928. This was the date of the expiration of all existing broadcasting licenses and the beginning of the period to be covered by new licenses. The Commission's decision of October 12th (R. 133) was construed by the Court of Appeals as a denial of the renewal application. (R. 390.) Thus the license which the Commission actually issued to General Electric Company and which was rejected by that Company did cover a period beginning November 11th, but, we submit, the period covered by that license is entirely independent of the effective date of a decision refusing another kind of license.

Under Section 16 the persons who may appeal are limited to the following:

> Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license, whose application is refused by the licensing

> authority * * * and any licensee whose license is revoked by the Commission.

Manifestly, the People of the State of New York are not entitled to appeal from a decision by the Commission refusing an application for renewal on the part of the General Electric Company.

Section 16 further provides that—

> Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license.

The Section also provides for the adducing of additional evidence with a specific time limitation and the requirement that it be done by leave of court on a—

> verified petition stating the nature and character of said additional evidence.

As has already been pointed out, the General Electric Company injected a mass of "additional evidence" into the record by attaching it to its notices of appeal. The Court of Appeals in its opinion sets forth supposed facts, apparently drawn in part from the matter thus introduced into the record. (R. 391.)

It is our contention that the Commission's decision of October 12th was not an appealable decision, in that it constituted a granting and not a denial of the renewal application. We submit that other sections of the statute show that it was

the intention of Congress that the licensing authority be unrestricted at the end of each license period in changing without a hearing the frequency, power, or hours of operation of any station, subject only to the test of public interest, convenience, or necessity. The portions of the Act which support this view are the opening sentence of Section 1, Section 4, and particularly subparagraphs (c) and (f), the last paragraph of Section 5, the second paragraph of Section 11, including Condition (A), and the last paragraph of Section 39. The Radio Act of 1927, as it stood before amendment, provided in Section 9 for maximum periods for broadcasting licenses not to exceed three years. This was cut down to three months by Section 3 of the Amendatory Acts of March 28, 1928 and March 4, 1929, respectively. Nevertheless, the principle remains the same. Congress sought to protect a station against changes *during the period of a license* by subparagraph (f) of Section 4. The chief purpose of the enactment of the Radio Act of 1927 and the establishment of the Commission was to bring about a complete reallocation of broadcasting stations so as to bring some measure of order and good reception out of chaos; this meant the complete elimination of some stations and the curtailment of the privileges of a large number of others. It could hardly have been intended that a hearing was to be necessary as to each such station under Section 11 of the Act or that any change was to be the basis for an appeal.

If the Commission had granted the renewal application of the General Electric Company to the fullest extent and for the maximum period authorized by law, the Commission would have issued such a license covering a period of three months from November 11, 1928, to February 11, 1929. Section 11 of the Act requires the Commission to examine each and every application for renewal of license and determine whether public interest, convenience, or necessity would be served by the granting thereof. Since the maximum period of broadcasting licenses is three months, the Commission must perform this duty every three months. The Court of Appeals has erroneously construed Section 16 of the Act as giving it power to make an original determination of what will serve public interest, convenience, or necessity in a case where the Commission has made no such determination in the first instance, and, in addition, a three months' period has elapsed so that it is again the Commission's duty to make a further determination on a further renewal application. We submit, therefore, that the question as to what respondent's station was entitled to on November 11, 1928, became moot on February 11, 1929, and the Court of Appeals thereafter had no power to determine either that question or what the respondent was "now" entitled to. *Security Mutual Life Insurance Company* v. *Prewitt,* 200 U. S. 446; *Mills* v. *Green,* 159 U. S. 651; *American Book Co.* v. *Kansas,* 193 U. S. 49; *Jones* v. *Montague,* 194 U. S. 147; *Cheong Ah Moy* v.

United States, 113 U. S. 216; *Tennessee* v. *Condon,* 189 U. S. 64.

Point B

The Radio Act of 1927 does not invest the Court of Appeals with the powers and duties of an administrative tribunal

It is our contention that the nature of the power with which the Court of Appeals is invested by the Radio Act of 1927 is judicial, authorizing the court only to pass on questions of law and intended simply as a protection against arbitrary or capricious action of the Commission; that it was never intended to give the Court of Appeals the power to substitute its judgment on matters of such a technical, specialized, or complex nature as those of radio communication for the judgment of the Commission, which is presumably a tribunal of experts, both by original choice and by experience. *People ex rel, N. Y. & Q. Gas Co.* v. *McCarl,* 245 U. S. 345. We realize, of course, that Congress has power to invest the Court of Appeals of the District of Columbia with the functions of an administrative tribunal in a proper case. *Keller* v. *Potomac Electric Power Company,* 261 U. S. 428. The mere fact, however, that it is that court which has been invested with supervision over the Commission's decisions, as distinguished from a District Court or a Circuit Court of Appeals, does not necessitate the conclusion that it was intended to give the Court of Appeals administrative powers.

The first paragraph of Section 16 provides that from certain decisions of the Commission, namely, those of revocation of license, the licensee may appeal either to the Court of Appeals or—

> to the District Court of the United States in which the apparatus licensed is operated.

Whether his appeal be to one court or to the other, the procedure to be followed by the licensee is exactly the same, including the provision for additional evidence and the scope of the judgment which may be entered by the court. Manifestly, the statute can not invest a District Court of the United States with administrative functions; if it attempts to, it is unconstitutional. *Keller* v. *Potomac Electric Power Company, supra.* If we assume that the statute is open to two constructions, that which is consistent with the Constitution should be adopted.

We submit that the provisions for review in Section 16 should be likened to those of Sections 5 and 6, Title Two, of the National Prohibition Act (41 Stat. 305) having to do with decisions of the Prohibition Commissioner, as construed by this court in *Ma-King Products Company* v. *Blair,* 271 U. S. 479. See also *Smith* v. *Foster,* 15 F. (2d) 115.

A not dissimilar provision to that contained in Section 16 of the Radio Act is that providing for leave to adduce additional evidence in the Federal Trade Commission Act and providing for appeals from that Commission's decisions to the Circuit

Court of Appeals (38 Stat. 717, Sec. 5). *See Eastman Kodak Company* v. *Federal Trade Commission,* 274 U. S. 620; *Chamber of Commerce of Minneapolis et al.* v. *Federal Trade Commission,* 280 Fed. 45 (C. C. A., 8th, 1922).

In the ordinary case in which additional evidence is sought to be taken, it would be the Federal Radio Commission which would be ordered to take it, and, we submit, the last sentence of the second paragraph of Section 16 should be so construed. It will be noticed that under the last sentence of Section 16—

> the revision by the court shall be confined to the points set forth in the reasons of appeal.

If petitioner be in error on the point under discussion and if the Court of Appeals be invested with administrative functions, then, we submit, the Court of Appeals had no power or jurisdiction to perform any of the following acts essentially judicial in character:

> (*a*) The assessing of costs against petitioner.
>
> (*b*) The issuance of the "stay order" of November 9, 1928.
>
> (*c*) The holding of regulations of the Commission invalid.

That a judgment for costs is a judicial function based on express statutory authority, see *Tesla Electric Co.* v. *Scott,* 101 Fed. 524. That a prerogative writ in aid of appellate jurisdiction is a judicial

function, see *Western Union Telegraph Company* v. *Myatt,* et al., 98 Fed. 335. That a determination of the validity of legislation or of a regulation which has the force of law is a judicial function, see *U. S. ex rel. Steinmetz* v. *Allen,* 192 U. S. 543.

That the Commission's regulations have the force of law is evident from the fact that violation of the regulations is ground for revocation of license under Section 14 as well as for criminal proceedings under Section 32. That the Court of Appeals was not intended to have the power of simply revising or ignoring the Commission's regulations is evident by a comparison of Section 16 with Section 5. When the Secretary of Commerce shall take over the powers of the Commission, the following provision will control appeals from decisions of the Secretary of Commerce to the Commission:

> Any person * * * aggrieved or whose interests are adversely affected by any decision, determination, or regulation of the Secretary of Commerce, may appeal therefrom to the Commission by filing with the Secretary of Commerce notice of such appeal within thirty days after such decision or determination or promulgation of such regulation.

Section 16 gives no such power to revise the Commission's regulations to the Court of Appeals. That such regulations have the force of law, see *U. S.* v. *Eaton,* 144 U. S. 677; *U. S.* v. *Grimaud,* 220 U. S. 506.

It may be argued that the Court of Appeals is and can lawfully be invested with both judicial and administrative functions. If this be the case, then certainly the Supreme Court of the United States may review the exercise of the judicial functions by writ of certiorari.

Point C

The Commission's regulations incorporated in General Order 40 and its regulations governing its procedure are valid

The only point made against the Commission's General Order 40 was that it should have provided for 50 cleared channels instead of 40. (R. 7, 21.) The Court of Appeals reduced the number from 40 to 39 by destroying 790 kc. as a cleared channel. Section 16 of the Radio Act of 1927 provides:

> The revision by the court shall be confined to the points set forth in the reasons of appeal.

The principles apparently enunciated by the Court of Appeals may necessarily result in a large further reduction in the number of cleared channels, both for the purpose of achieving equality among the five Zones and to recognize similar claims of other daytime or limited time stations. Twenty-four of the 40 cleared channels have daytime or limited time stations assigned to them. (R. 134–160.) The reasonableness of General Order 40 rests upon complicated engineering facts and principles which are set forth at length in the record.

(R. 282-363.) The number of cleared channels could not be increased without either entirely eliminating or fatally curtailing the many stations on regional and local channels. Examples of the present assignments on regional chanels are the frequencies 550, 560, 570, and 950 kc. (R. 136-141.) Examples of the present assignments on local channels are the frequencies of 1,200 and 1,210 kc. (R. 145-148.) We submit that the facts in the record amply demonstrate the reasonableness and validity of General Order 40. The necessity for cleared channels is in the fact that they furnish the only means of giving broadcasting service to the large rural areas of the United States. (R. 304, 306, 351.)

General Order 40 was authorized and required by subparagraph (f) of Section 4 of the Radio Act of 1927 and Section 5 of the Amendatory Act of 1928. The Court of Appeals has provided no substitute or suggested any method of either restoring the equality it has destroyed as between the Zones or of eliminating the additional interference to which it has subjected the people of the Fifth Zone.

The Commission's regulations governing procedure (R. 114, 181-2) are the only method of reducing controversies between competing broadcasting stations to justiciable issues. Unless a station which desires a better assignment is required to specify what frequency, power, and/or hours it de-

sires, then it is impossible to determine what other stations have an interest entitling them to be heard on the application. Presumably a station in making an application will select a position occupied by the station with the weakest claim thereto, and thus the issues will be automatically reduced to a comparison of the claims of a limited number of stations. Otherwise the only alternative is to call in a tremendously large number of stations. Inasmuch as there are only 90 channels available for use by broadcasting in the United States and there are nearly 650 broadcasting stations already in existence, with a great many additional applicants, no change can be made except at the expense of some other existing station and its listening public. The standard of "public interest, convenience, or necessity" is, therefore, comparative and not absolute as applied to broadcasting stations. A necessary element in the comparison is, of course, the need of any particular region for broadcasting service, as distinguished from some other reason. Such issues can be developed only under the Commission's procedure and can not be developed on an *ex parte* hearing of the claims of a single station.

Point D

The judgment of the Court of Appeals was arbitrary and capricious

It has already been explained that in so far as the Court of Appeals determined that public interest, convenience, or necessity would be served by

granting respondent's application for full time operation on 790 kc., it did so solely on the basis of *ex parte* statements of respondent itself and its attorneys, including a great deal of matter not properly in the record. There is absolutely nothing in the record justifying the Court of Appeals in finding that WGY is entitled to full time on 790 kc., as distinguished from any of the 8 cleared channels assigned to the First Zone, all of which are "substantially equivalent." According to its reasons for appeal, respondent did not insist on 790 kc. but asked for "any frequency substantially equivalent." (R. 2, 8, 14, 22.) It could have had any of the 8 cleared channels assigned to the First Zone by making a proper application and sufficient showing on a hearing as against the stations tentatively assigned to such channel.

The Court of Appeals completely ignored the arrangment proposed by the Commission, which would have permitted WGY to broadcast until 10 P. M. every evening with only a small curtailment on Station KGO. (R. 117–119, 123.) There was nothing before the Court of Appeals showing whether public interest, convenience, or necessity would or would not be served by the small curtailment of KGO of 51 minutes daily prior to 7 P. M.

The Court of Appeals ignored the facts in the record showing that respondent had every opportunity for a hearing and chose instead to defy the Commission's regulations. (R. 126, 162–171.)

The Court of Appeals virtually made a finding that the interference that would be caused by the simultaneous evening operation of WGY and KGO was not serious. (R. 392.) The only evidence in the record is to the contrary. (See, for example, R. 354–355.) Respondent by necessary implication conceded the seriousness of the interference by insisting that there should have been 50 cleared channels instead of 40 and that it should have had one.

If the Court of Appeals sits as an administrative tribunal under Section 16 of the Radio Act of 1927, then the Supreme Court of the United States is the only tribunal in which relief can be had against arbitrary and capricious conduct on the part of the Court of Appeals.

Point E

The Court of Appeals erred in assessing costs against the Commission

Whether the Court of Appeals performs judicial or administrative functions in reviewing decisions of the Commission, the Commission is an inferior tribunal and not a party in the ordinary sense. Costs should not, therefore, be assessed against it for erroneous decisions.

The judgment of the Court of Appeals assessed costs in favor of respondent, People of the State of New York, although said respondent manifestly had no standing on appeal. The court also assessed costs in favor of respondent, General Electric Company, on both of the two appeals, although obviously one of them must have been unnecessary.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this court should review the decision of the Court of Appeals of the District of Columbia and finally reverse it.

FEDERAL RADIO COMMISSION,

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APPENDIX A

[PUBLIC—No. 632—69TH CONGRESS]

[H. R. 9971]

An Act For the regulation of radio communications, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c)

from any place in any State, Territory, or possession of the United States, or in the District of Columbia to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

SEC. 2. For the purposes of this Act, the United States is divided into five zones, as follows: The first zone shall embrace the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Delaware, Maryland, the District of Columbia, Porto Rico, and the Virgin Islands; the second zone shall embrace the States of Pennsylvania, Virginia, West Virginia, Ohio, Michigan, and Kentucky; the third zone shall embrace the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, Mississippi, Arkansas, Louisiana, Texas, and Oklahoma; the fourth zone shall embrace the States of Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Kansas, and Missouri; and the fifth zone shall embrace the States of Montana, Idaho, Wyoming,

Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, California, the territory of Hawaii, and Alaska.

SEC. 3. That a commission is hereby created and established to be known as the Federal Radio Commission, hereinafter referred to as the commission, which shall be composed of five commissioners appointed by the President, by and with the advice and consent of the Senate, and one of whom the President shall designate as chairman: *Provided*, That chairmen thereafter elected shall be chosen by the commission itself.

Each member of the commission shall be a citizen of the United States and an actual resident citizen of a State within the zone from which appointed at the time of said appointment. Not more than one commissioner shall be appointed from any zone. No member of the commission shall be financially interested in the manufacture or sale of radio apparatus or in the transmission or operation of radiotelegraphy, radiotelephony, or radio broadcasting. Not more than three commissioners shall be members of the same political party.

The first commissioners shall be appointed for the terms of two, three, four, five, and six years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed.

The first meeting of the commission shall be held in the city of Washington at such time and place as the chairman of the commission may fix. The com-

mission shall convene thereafter at such times and places as a majority of the commission may determine, or upon call of the chairman thereof.

The commission may appoint a secretary, and such clerks, special counsel, experts, examiners, and other employees as it may from time to time find necessary for the proper performance of its duties and as from time to time may be appropriated for by Congress.

The commission shall have an official seal and shall annually make a full report of its operations to the Congress.

The members of the commission shall receive a compensation of $10,000 for the first year of their service, said year to date from the first meeting of said commission, and thereafter a compensation of $30 per day for each day's attendance upon sessions of the commission or while engaged upon work of the commission and while traveling to and from such sessions, and also their necessary traveling expenses.

SEC. 4. Except as otherwise provided in this Act, the commission, from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or interest or will serve public necessity or the provisions of this Act will be more fully complied with;

(g) Have authority to establish areas or zones to be served by any station;

(h) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(i) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(j) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(k) Have authority to hold hearings, summon witnesses, administer oaths, compel the production of books, documents, and papers and to make such investigations as may be necessary in the performance of its duties. The commission may make such

expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the commission and, as from time to time may be appropriated for by Congress. All expenditures of the commission shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman.

SEC. 5. From and after one year after the first meeting of the commission created by this Act, all the powers and authority vested in the commission under the terms of this Act, except as to the revocation of licenses, shall be vested in and exercised by the Secretary of Commerce; except that thereafter the commission shall have power and jurisdiction to act upon and determine any and all matters brought before it under the terms of this section.

It shall also be the duty of the Secretary of Commerce—

(A) For and during a period of one year from the first meeting of the commission created by this Act, to immediately refer to the commission all applications for station licenses or for the renewal or modification of existing station licenses.

(B) From and after one year from the first meeting of the commission created by this Act, to refer to the commission for its action any application for a station license or for the renewal or modification of any existing station license as to the granting of which dispute, controversy, or conflict arises or against the granting of which protest is filed within ten days after the date of filing said appli-

cation by any party in interest and any application as to which such reference is requested by the applicant at the time of filing said application.

(C) To prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such persons as he finds qualified.

(D) To suspend the license of any operator for a period not exceeding two years upon proof sufficient to satisfy him that the licensee (a) has violated any provision of any Act or treaty binding on the United States which the Secretary of Commerce or the commission is authorized by this Act to administer or by any regulation made by the commission or the Secretary of Commerce under any such Act or treaty; or (b) has failed to carry out the lawful orders of the master of the vessel on which he is employed; or (c) has willfully damaged or permitted radio apparatus to be damaged; or (d) has transmitted superfluous radio communications or signals or radio communications containing profane or obscene words or language; or (e) has willfully or maliciously interfered with any other radio communication or signals.

(E) To inspect all transmitting apparatus to ascertain whether in construction and operation it conforms to the requirements of this Act, the rules and regulations of the licensing authority, and the license under which it is constructed or operated.

(F) To report to the commission from time to time any violations of this Act, the rules, regulations, or orders of the commission, or of the terms or conditions of any license.

(G) To designate call letters of all stations.

(H) To cause to be published such call letters and such other announcements and data as in his judgment may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act.

The Secretary may refer to the commission at any time any matter the determination of which is vested in him by the terms of this Act.

Any person, firm, company, or corporation, any State or political division thereof aggrieved or whose interests are adversely affected by any decision, determination, or regulation of the Secretary of Commerce may appeal therefrom to the commission by filing with the Secretary of Commerce notice of such appeal within thirty days after such decision or determination or promulgation of such regulation. All papers, documents, and other records pertaining to such application on file with the Secretary shall thereupon be transferred by him to the commission. The commission shall hear such appeal de novo under such rules and regulations as it may determine.

Decisions by the commission as to matters so appealed and as to all other matters over which it has jurisdiction shall be final, subject to the right of appeal herein given.

No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise

* * * * *

SEC. 9. The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same.

No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses.

No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

SEC. 10. The licensing authority may grant station licenses only upon written application therefor addressed to it. All applications shall be filed with the Secretary of Commerce. All such applications shall set forth such facts as the licensing authority by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the

ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies or wave lengths and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The licensing authority at any time after the filing of such original application and during the term of any such license may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

The licensing authority in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States," approved May 24, 1921.

SEC. 11. If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of

any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Such station licenses as the licensing authority may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(A) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

(B) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(C) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 6 hereof.

In cases of emergency arising during the period of one year from and after the first meeting of the commission created hereby, or on applications filed during said time for temporary changes in terms of licenses when the commission is not in session and prompt action is deemed necessary, the Secretary of Commerce shall have authority to exercise the powers and duties of the commission, except as to revocation of licenses, but all such exercise of powers shall be promptly reported to the members of the commission, and any action by the Secretary authorized under this paragraph shall continue in

force and have effect only until such time as the commission shall act thereon.

* * * * *

SEC. 14. Any station license shall be revocable by the commission for false statements either in the application or in the statement of fact which may be required by section 10 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the licensing authority in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, for violation of or failure to observe any of the restrictions and conditions of this Act, or of any regulation of the licensing authority authorized by this Act or by a treaty ratified by the United States, or whenever the Interstate Commerce Commission, or any other Federal body in the exercise of authority conferred upon it by law, shall find and shall certify to the commission that any licensee bound so to do, has failed to provide reasonable facilities for the transmission of radio communications, or that any licensee has made any unjust and unreasonable charge, or has been guilty of any discrimination, either as to charge or as to service or has made or prescribed any unjust and unreasonable classification, regulation, or practice with respect to the transmission of radio communications or service: *Provided,* That no such order of revocation shall take effect until thirty days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the parties known by the commission to be interested in such license. Any person

in interest aggrieved by said order may make written application to the commission at any time within said thirty days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing herein directed. Notice in writing of said hearing shall be given by the commission to all the parties known to it to be interested in such license twenty days prior to the time of said hearing. Said hearing shall be conducted under such rules and in such manner as the commission may prescribe. Upon the conclusion hereof the commission may affirm, modify, or revoke said orders of revocation.

* * * * *

SEC. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the

originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal.

* * * * *

SEC. 21. No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the licensing authority upon written application therefor. The licensing authority may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the licensing authority by regulation may prescribe as to the citizenship, character, and the financial, technical, and other

ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies and wave length or wave lengths desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the licensing authority may require. Such application shall be signed by the applicant under oath or affirmation.

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the licensing authority may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person, firm, company, or corporation without the approval of the licensing authority. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction for which a permit has been granted, and upon it being made to appear to the licensing authority that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no

cause or circumstance arising or first coming to the knowledge of the licensing authority since the granting of the permit would, in the judgment of the licensing authority, make the operation of such station against the public interest, the licensing authority shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

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SEC. 32. Any person, firm, company, or corporation failing or refusing to observe or violating any rule, regulation, restriction, or condition made or imposed by the licensing authority under the authority of this Act or of any international radio convention or treaty ratified or adhered to by the United States, in addition to any other penalties provided by law, upon conviction thereof by a court of competent jurisdiction, shall be punished by a fine of not more than $500 for each and every offense.

SEC. 33. Any person, firm, company, or corporation who shall violate any provision of this Act, or shall knowingly make any false oath or affirmation in any affidavit required or authorized by this Act, or shall knowingly swear falsely to a material matter in any hearing authorized by this Act, upon conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than $5,000 or by imprisonment for a term of not more than five years or both for each and every such offense.

* * * * *

SEC. 39. The Act entitled "An Act to regulate radio communication," approved August 13, 1912,

the joint resolution to authorize the operation of Government-owned radio stations for the general public, and for other purposes, approved June 5, 1920, as amended, and the joint resolution entitled "Joint resolution limiting the time for which licenses for radio transmission may be granted, and for other purposes," approved December 8, 1926, are hereby repealed.

Such repeal, however, shall not affect any act done or any right accrued or any suit or proceeding had or commenced in any civil cause prior to said repeal, but all liabilities under said laws shall continue and may be enforced in the same manner as if committed; and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by this Act, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

Nothing in this section shall be construed as authorizing any person now using or operating any apparatus for the transmission of radio energy or radio communications or signals to continue such use except under and in accordance with this Act and with a license granted in accordance with the authority hereinbefore conferred.

SEC. 40. This Act shall take effect and be in force upon its passage and approval, except that for and during a period of sixty days after such approval no holder of a license or an extension thereof issued by the Secretary of Commerce under said Act of August 13, 1912, shall be subject to the penalties provided herein for operating a station without the license herein required.

SEC. 41. This Act may be referred to and cited as the Radio Act of 1927.

Approved, February 23, 1927.

APPENDIX B

[PUBLIC—NO. 195—70TH CONGRESS]

[S. 2317]

An Act Continuing for one year the powers and authority of the Federal Radio Commission under the Radio Act of 1927, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the powers and authority vested in the Federal Radio Commission by the Radio Act of 1927, approved February 23, 1927, shall continue to be vested in and exercised by the commission until March 16, 1929; and wherever any reference is made in such Act to the period of one year after the first meeting of the commission, such reference shall be held to mean the period of two years after the first meeting of the commission.

* * * * *

SEC. 3. Prior to January 1, 1930, the licensing authority shall grant no license or renewal of license under the Radio Act of 1927 for a broadcasting station for a period to exceed three months and no license or renewal of license for any other class of station for a period to exceed one year.

* * * * *

SEC. 5. The second paragraph of section 9 of the Radio Act of 1927 is amended to read as follows:

> It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of recep-

tion, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States, within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided,* That if and when there is a lack of applications from any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the

State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located.

Approved, March 28, 1928.

APPENDIX C

[PUBLIC—No. 1029—70TH CONGRESS]

[H. R. 15430]

An Act Continuing the powers and authority of the Federal Radio Commission under the Radio Act of 1927, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the powers and authority vested in the Federal Radio Commission by the Radio Act of 1927, approved February 23, 1927, shall continue to be vested in and exercised by the commission until December 31, 1929; and wherever any reference is made in such Act to the period of one year after the first meeting of the commission, such reference shall be held to mean the period until December 31, 1929.

* * * * *

SEC. 3. Prior to January 1, 1931, the licensing authority shall grant no license or renewal of license under the Radio Act of 1927 for a broadcasting station for a period to exceed three months and no license or renewal of license for any other class of station for a period to exceed one year.

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Approved, March 4, 1929.

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